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COURT OF CRIMINAL APPEALS
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NO. PD-0343-17

IN THE COURT OF CRIMINAL APPEALS

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COURT OF CRIMINAL APPEALS
12/18/2017
DEANA WILLIAMSON, CLERK

JAMEL McLELLAND FOWLER, Appellant

v.

THE STATE OF TEXAS, Appellee

On Discretionary Review from the Sixth Court of Appeals
No. 06-16-00038-CR
On Appeal from the 196th Judicial District Court, Hunt County
No. 30456

APPELLANT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Appellant was convicted of stealing an all-terrain vehicle (ATV). On appeal, Appellant challenged the sufficiency of the evidence, claimed error in the admission of extraneous offense evidence, and claimed reversible error by the trial court in admitting an unauthenticated video exhibit into evidence, which was one of the main pieces of evidence supporting the guilt of Appellant. The Sixth Court of Appeals reversed Appellant's conviction and remanded the case for a new trial because the State presented no direct evidence of the video's authentication.

STATEMENT REGARDING ORAL ARGUMENTS

Appellant does not request oral arguments.

ISSUES PRESENTED

Issue One:

May the proponent of a video sufficiently prove its authenticity without the testimony of someone who either witnessed what the video depicts or is familiar with the functioning of the recording device?

NO. PD-0343-17

IN THE COURT OF CRIMINAL APPEALS

JAMEL McLELLAND FOWLER, Appellant

v.

THE STATE OF TEXAS, Appellee

BRIEF ON THE MERITS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Appellant respectfully submits this Brief on the Merits from the Sixth Court of Appeals' decision in *Fowler v. State*, 517 S.W.3d 167 (Tex. App.—Texarkana 2017, pet. granted).

STATEMENT OF FACTS

The panel opinion, as well as Appellee's brief on the merits correctly state the nature of this case and there is no dispute as to the facts alleged.

SUMMARY OF ARGUMENT

The Court of Appeals was correct in their holding that the video surveillance footage from the Family Dollar store was not properly authenticated and the trial court erred by admitting it into evidence.

ARGUMENT

ISSUE ONE: May the proponent of a video sufficiently prove its authenticity without the testimony of someone who either witnessed what the video depicts or is familiar with the functioning of the recording device?

"To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." TEX. R. EVID. 901(a). Evidence has no relevance if it is not authentically what its proponent claims it to be. Rule 901(a) of the Rules of Evidence defines authentication as a "condition precedent" to admissibility of evidence that requires the proponent to make a threshold showing that would be "sufficient to support a finding that the matter in question is what its proponent claims." Whether the proponent has crossed this threshold as required by Rule 901 is one of the preliminary questions of admissibility contemplated by Rule 104(a). See *Druery v. State,* 225 S.W.3d 491, 502 (Tex.Crim.App. 2007). The trial court should admit proffered evidence "upon, or subject to the introduction of evidence sufficient to support a finding of" authenticity. TEX. R. EVID. 104(b).

"Video recordings or motion pictures sought to be used in evidence are treated as photographs and are properly authenticated when it can be proved that the images reflect reality and are relevant." *Cain v. State*, 501 S.W.3d 172, 174 (Tex. App.—Texarkana 2016, no pet.) (citing *Huffman v. State*, 746 S.W.2d 212, 222 (Tex. Crim. App. 1988)). As with the authentication of any evidence, "the best and most appropriate method for authenticating electronic evidence will often depend on the nature of the evidence and the circumstances of a particular case." *Tienda v. State,* 358 S.W.3d 633, 639 (Tex. Crim. App. 2012)

The present case is distinguishable from the cases cited by Appellee for two reasons:

1. This case deals with a specific fact scenario regarding date and time stamps on machinery that can be altered or manipulated by power outages, technical malfunctions, and human tampering or error; and

2. Unlike the foundations laid in the cases cited by Appellee, not a single person could testify in this case as to the ownership of or operation of the original recording device or any part of the original even recorded.

The State relies on *Angleton vs. State,* 917 S.W.2d 65 (1998), to support their argument that the Family Dollar surveillance tape was properly authenticated. However, in *Angleton*, a sponsoring witness was proffered who testified he knew and recognized the voices on the admitted tape based on several previous

conversations. Additionally, information from the videotape in *Angleton* was actually admitted to by the defendant in that case, further authenticating the content. Unlike the recording in *Angleton*, there is no evidence in the record which establishes the origin of the original recording which was subsequently copied and presented as evidence.

Yet another distinction between the *Angleton* facts and those at bar is that in *Angleton*, the court was able to determine that the tape was a continuous conversation and not a result of splicing or editing.

The facts at bar are vastly different. The State did offer a witness who was able to testify that he accurately recorded what he saw and that his recording accurately depicted what the monitor was showing. However, the State failed to authenticate the tape because the testifying officer knew nothing regarding the circumstances of when and how the tape had been made, had no personal knowledge of where or when the tape had been made, and could not state that the original recording accurately represented the actual scene or event at the time it occurred.

While this Court has made it clear there is no strict admissibility test that must be rigidly adhered to for electronic evidence to be admitted, the Court has also been steadfast that there must be *some* form of reliable evidence to authenticate evidenced that is admitted. In this case, the State did not attempt to have any witness from the Family Dollar store or the security equipment company to testify as to any aspect of

the original recording or the equipment used to produce the recording. If, as the testimony of the State's witnesses suggests, it was impossible for the State to obtain the original of the recording, the State could, at the very least, attempt to introduce evidence of the systems working as in *Page v. State*, 125 S.W.3d 640, 648–49 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (finding sufficient evidence of authentication where the sponsoring witness explained how the store's digital camera system worked, testified that he obtained the recorded images from the system shortly after the robbery there at issue, reviewed the recording with the police, copied the recording onto a videotape, gave the videotape to the officers, viewed the videotape before trial, and concluded that it had not been altered).

Also instructive, as noted by the Sixth Court of Appeals, is *Standmire v. State*, 475 S.W.3d 336, 344 (Tex. App.—Waco 2014, pet. ref'd) when suggesting criteria to consider when analyzing authentication of security video "such as those used after hours in convenience stores and freestanding automatic teller machines."

This Court has interpreted Rule 901 to require the "sponsoring witness to have knowledge that the evidence is what its proponent says it is." *Angleton v. State,* 955 S.W.2d 655, 659 (Tex.App.1997). Thus, the court of appeals was correct when it concluded the tape was not properly authenticated because the sponsoring witness admitted it was not the original, was unable to provide any information as to the facts and circumstances of the event recorded or the system on which the recording was

made, and could neither swear the tape was an accurate recording of the interaction it purported to represent. Under Rule 901, the State is required to furnish testimony of a witness who could verify the tape was what the State claimed it to be. In the absence of such evidence, the State failed to lay the proper predicate for the court to admit the tape into evidence.

Should this court accept the State's argument, a door will have been opened that will allow the State to rely on electronic systems that are subject to automatic resets in the event of power outages or inclement weather, automatic and manual updates that can affect the system, as well as manual error. Rule 901 is clear. The proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is. Appellant does not contend, nor did the Court of Appeals hold, that the trial court should adhere to a rigid test. Rather, the Court of Appeals correctly stated that there must be sufficient evidence to support the relevance and authenticity of a recording.

There are some very tried and true methods upheld by courts as ways to authentic videos. The most common is by testimony that the photo or video is an accurate representation of the object or scene in question. *See Huffman v. State,* 746 S.W.2d 212, 222 (Tex.Crim.App.1988). The sponsoring witness is not required to be the person who operated the camera or video equipment. *Id.* Another slightly less common but equally permissible way is by testimony that the process or system that

produced the photo or video is reliable. *See Reavis v. State,* 84 S.W.3d 716, 720 (Tex.App.-Fort Worth 2002, no pet.). Reliability of the system or process is most often used when there is no witness that was present at the scene or event depicted in the photograph or video. This is common with security videos; such as those used after hours in convenience stores and freestanding automatic teller machines. For authentication of such photographic or video evidence, the sponsoring witness usually 1) describes the type of system used for recording and whether it was working properly; 2) testifies whether he reviewed the video or photos; 3) testifies whether he removed the video or device that stores the photos; and 4) testifies whether the video or photos have been altered or tampered with. *See id.; see also Randell v. State,* No. 07–11–00493–CR, 2013 WL 309001, *2–3, 2013 Tex.App. LEXIS 742, *5–7 (Tex.App.-Amarillo Jan. 25, 2013, pet. ref'd); *Warren v. State,* No. 08–11–00029–CR, 2012 WL 651642, *1–2, 2012 Tex.App. LEXIS 1544, *3 (Tex.App.-El Paso Feb. 29, 2012, no pet.) (not designated for publication).

The State introduced nothing of the sort in the case at bar. There is no explanation in the record as to why the State failed to call any witnesses to testify as to the reliability of the equipment producing the original recording. By failing to do this, the State failed to produce any evidence as to the authenticity and reliability of the video recording. This failure also denied Appellant his right to confront his

accusers through cross examination and denied him his opportunity to test the evidence.

The State, in its argument, relies on *Tienda v. State*, 358 S.W.3d 633, 647 (Tex. Crim. App. 2012) and *Butler v. State,* 459 S.W.3d 595, 603 (Tex. Crim. App. 2015) cases. Each of those cases are distinguishable in that in each case, both the cell phone and the My Space page were able to be authenticated by someone who either owned the account or knew that some part of the system was working properly. The owner of the cell phone knew her cell phone was working. The owner of the My Space page knew her my space was working properly. While there was no evidence regarding the person on the other end of the message who was sending the messages, the courts at the very least had the owner of part of the equipment to authenticate their involvement with the transmissions. In the case at bar, we have nothing of the sort. There is no evidence from anyone present during the transaction. There is no evidence form any individual regarding the recording equipment. There is no evidence from any person identifying Appellant as the person on the video.

The State took a shortcut in this case and is asking this court to do the work for them that they didn't do and assume that the surveillance system was accurate and that the information retrieved from it is trustworthy, with no testimony to support that contention. If Rule 901 is allowed to be interpreted so broadly, our legal system will be opened up to evidence based on speculation and assumption, and that is

clearly not the legislative intent of Rule 901. As a result, as noted in footnote 14, to reverse the Court of Appels decision "could encourage the circumvention of problems in the admissibility of an original recording by simply making a copy of the original and offering the copy and not the original." *Fowler v. State*, 517 S.W.3d 167, 175 (Tex. App.—Texarkana 2017, pet. granted)

PRAYER

Appellant requests that this court uphold the Sixth Court of Appeal's to affirm the trial court's judgment granting Appellant a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 13th day of December 2017 a true and correct copy of the foregoing Brief on the Merits was sent to all parties to this proceeding by sending this Brief through efile or email to:

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On this same date, a courtesy copy has also been sent to Appellant at his last known address.

/s/Jessica Edwards
Jessica Edwards

CERTIFICATE OF COMPLIANCE WITH NUMBER OF WORDS

I certify that this document complies with: (1) the type-volume limitations because it is computer-generated and does not exceed 15,000 words. Using the word- count feature of Microsoft Word, this document contains 1,811 words except in the following sections: caption, identity of parties and counsel, table of contents, index of authorities, statement of the case, statement of issues presented, statement of jurisdiction, signature, proof of service, certification, certificate of compliance, and appendix; and (2) the typeface requirements because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point font. *See* Tex. Rule App. Proc. 9.4 (2017).

517 S.W.3d 167
Court of Appeals of Texas,
Texarkana.

Jamel McLelland FOWLER, Appellant
v.
The STATE of Texas, Appellee

No. 06-16-00038-CR
|
Date Submitted: October 6, 2016
|
Date Decided: March 17, 2017
|
Petition for Discretionary Review Granted September 27, 2017

Synopsis

Background: Defendant was convicted in the 196th District Court, Hunt County, Andrew Bench, J., of theft of an all terrain vehicle (ATV). Defendant appealed.

Holdings: The Court of Appeals, Moseley, J., held that:

[1] store's original surveillance video, a portion of which was used to make an authenticated duplicate recording, was not properly authenticated;

[2] error in admitting insufficiently authenticated store surveillance footage was harmful; but

[3] evidence was sufficient to support conviction.

Reversed and remanded.

West Headnotes (14)

[1] **Criminal Law** Photographs and Other Pictures
Criminal Law Photographs and videos

Video recordings or motion pictures sought to be used in evidence are treated as photographs and are properly authenticated when it can be proved that the images reflect reality and are relevant. Tex. R. Evid. 901(a).

Cases that cite this headnote

[2] **Criminal Law** Photographs and Other Pictures

In ruling on the admission or exclusion of photographic evidence, the trial court is accorded considerable discretion. Tex. R. Evid. 901(a).

Cases that cite this headnote

[3] **Criminal Law** Photographs and videos

The trial judge does not abuse his or her discretion in admitting photographic evidence where he or she reasonably believes that a reasonable juror could find that the evidence has been authenticated or identified. Tex. R. Evid. 901(a).

Cases that cite this headnote

[4] **Criminal Law** Photographs and videos

Store's original surveillance video recording, a portion of which was used to make an authenticated duplicate recording via officer's use of police department-issued video camera that he focused on the original recording, was not properly authenticated; while the date and time on the lower center part of screen on officer's recording generally corresponded with date and time on receipt found near an all terrain vehicle (ATV) that was stolen from store, there was no evidence that the surveillance system was working properly on date in question, that its on-screen clock was correctly set and functioning properly, or that the original recording accurately portrayed events that purportedly occurred at time and on date shown in the recording. Tex. R. Evid. 901(a).

Cases that cite this headnote

[5] **Criminal Law** Evidence in general

Criminal Law Exclusion of Evidence

Generally, errors resulting from admission or exclusion of evidence are nonconstitutional.

Cases that cite this headnote

[6] **Criminal Law** Prejudice to Defendant in General

A defendant's substantial right is affected by a nonconstitutional error when the error had a substantial and injurious effect or influence in determining the jury's verdict. Tex. R. App. P. 44.2(b).

Cases that cite this headnote

[7] **Criminal Law** Matters or Evidence Considered

In assessing whether a nonconstitutional error affected a defendant's substantial rights, the Court of Appeals considers everything in the record, the nature of the evidence supporting the verdict, the character of the alleged error, and how it relates to other evidence in the record. Tex. R. App. P. 44.2(b).

Cases that cite this headnote

[8] **Criminal Law** Documentary and demonstrative evidence

Trial court's error in admitting recording of insufficiently authenticated store surveillance footage affected defendant's substantial rights in theft prosecution and was, therefore, harmful; the recording was the evidence linking defendant to the stolen all terrain vehicle (ATV) at issue, as state's case was based on premise that defendant was the person depicted in footage purchasing box cutter, a receipt of which was found near the stolen ATV. Tex. R. App. P. 44.2(b).

Cases that cite this headnote

[9] **Criminal Law** Weight and sufficiency

Legal sufficiency of the evidence is measured by the elements of the offense as defined by the measure known as the hypothetically correct jury charge; the hypothetically correct jury charge is one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the state's burden of proof or unnecessarily restrict the state's theories of liability, and adequately describes the particular offense for which the defendant was tried.

Cases that cite this headnote

[10] **Criminal Law** Circumstantial Evidence

A conviction can be supported solely by circumstantial evidence.

Cases that cite this headnote

[11] **Criminal Law** Relevancy in General

Evidence merely tending to affect the probability of the truth or falsity of a fact in issue is logically relevant.

Cases that cite this headnote

[12] **Criminal Law** Relevancy in General

The evidence need not by itself prove or disprove a particular fact to be relevant; it is sufficient if the evidence provides a small nudge toward proving or disproving some fact of consequence.

Cases that cite this headnote

[13] **Criminal Law** Weight and sufficiency

In performing a review of the sufficiency of the evidence, the Court of Appeals must consider all of the evidence admitted at trial, even if that evidence was improperly admitted.

Cases that cite this headnote

[14] **Larceny** Weight and Sufficiency

Evidence was sufficient to support defendant's conviction for theft of all terrain vehicle (ATV); evidence indicated that the stolen ATV was found hidden in wooded area near business that had sustained multiple burglaries, bolt cutters were used in those burglaries, multiple bolt cutters were found in defendant's truck, which was found a few times in odd hours and under suspicious circumstances in the neighborhood of the business, and, based on store surveillance footage, defendant was the person who made transaction linked to receipt found near the stolen ATV.

Cases that cite this headnote

***169** On Appeal from the 196th District Court, Hunt County, Texas, Trial Court No. 30456. Andrew Bench, Judge.

Attorneys and Law Firms

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Before Morriss, C.J., Moseley and Burgess, JJ.

OPINION

Opinion by Justice Moseley

Jamel McLelland Fowler was convicted of theft of a Kawasaki mule all terrain vehicle (ATV) valued at $1,500.00 or more, but less than $20,000.00.[1] On appeal,[2] Fowler challenges the sufficiency of the evidence, claims error in the admission of extraneous offense evidence, and claims reversible error by the trial court in admitting an unauthenticated video exhibit into evidence. While we find the evidence sufficient to sustain Fowler's conviction, we also find that the trial court reversibly erred in admitting an unauthenticated video exhibit into evidence; consequently we reverse the trial court's judgment and remand to the trial court for a new trial.

I. Trial Court Proceedings

In 2014, Fowler was charged by three separate indictments with three separate crimes. In the indictment which led to the conviction on appeal in this matter, Fowler was accused of stealing the ATV from Paul Blassingame. The other two indictments alleged burglaries of buildings. In one of the other charges, Fowler was accused of breaking into a building owned by William ***170** Martin and stealing various items (Burglary Case No. 1);[3] in the other, Fowler was charged with burglarizing a building and stealing a trailer (Burglary Case No. 2).[4] All three indictments were returned in Hunt County. The State moved to try the cases together, alleging that they "constitute[d] the same criminal episode because they [were] the repeated commission of similar acts." Fowler did not oppose consolidation of the three cases.

II. The Evidence

The facts of the three alleged offenses are intertwined and will have some bearing on the issues Fowler presents in this appeal. As previously stated, this appeal is of Fowler's conviction of the theft of the ATV. Blassingame testified that the ATV had been located on property he owned in Hunt County, which he visited often. In November 2014, he went to that property, where he discovered that the ATV was missing, a fact that he duly reported to the Hunt County Sheriff's Office as a theft. Law enforcement officers in Royse City of neighboring Rockwall County found the ATV on December 6, 2014, while investigating a burglary at a concrete supply business. The ATV was identified by its vehicle identification number and returned to Blassingame.

The ATV was found hidden in a wooded area beyond a field on property owned by Lattimore Materials,[5] a ready-mix concrete business that had suffered a series of burglaries over the months preceding the discovery of the ATV. While investigating one of the burglaries that occurred at Lattimore Materials in December 2014, Royse City policemen noticed tire tracks (which they believed were made by an ATV) which led from the building that had been burglarized to a tree line; just beyond the tree line was the copse of trees in which the ATV was hidden. There was trash scattered on the ground around the ATV, among which was a receipt from a Family Dollar store that included the time and date of its issuance. Further, within fifteen feet or so of the ATV, the policemen found packaging in which a box cutter had been located, and a box cutter was one of the items listed on the Family Dollar store receipt. Royse City Police Officer Jaime

Torrez took the receipt to the store that had issued it and was able to view the store's surveillance video recording showing what appeared to be the purchase memorialized by the receipt. The store was unable to duplicate the recording or render it to a format Torrez could take with him, so he and an officer he was training used Torrez' department-issued camera to record the surveillance footage as it played on the store's video monitor. The footage's date and time information corresponded generally to the date on the receipt. Particularly of note to the State's case, the recording showed a man entering the store then completing a purchase, and it was the State's theory at trial that that man was Fowler.

***171** In addition to those circumstances, in the weeks leading up to the December discovery of Blassingame's ATV, officers had found a blue Nissan Xterra vehicle in the area under suspicious circumstances. On November 3, 2014, at about 1:45 a.m., Royse City Police Sergeant Ryan Curtis and Rockwall County Deputy Brad Dick found the truck parked on a dirt road behind some industrial businesses in a poorly lit area. [6] Virginia Cox (eventually named as a co-defendant with Fowler in one or more of his indictments) was sitting in the Xterra. Cox's explanation to the law enforcement officers of her whereabouts was that she and her boyfriend had run out of gasoline and that he had gone back to a gas station for fuel. Because one of the businesses (Four Brothers, a mower and tractor dealer) behind which Cox's vehicle was parked had been the victim of multiple burglaries in the past, Curtis was suspicious of Cox. Curtis saw several sets of bolt cutters in the Xterra [7] and got another police officer to go to the nearest gas station. That officer encountered no one purporting to be in search of gasoline for a stalled vehicle. When Curtis asked Cox to attempt to start the vehicle, it started with no problem (thereby casting doubt on Cox's story that it had no fuel).

At about 6:00 a.m. that same day, Royse City Police Officers William Potter and Tim West observed the same blue Xterra in another part of Royse City parked on the side of a local county road. As previously, the vehicle was occupied only by Cox, and when she was questioned by the policemen, she made reference once again to a male companion. Later that morning, Potter and West again encountered the Xterra, this time containing both Cox and Fowler. Between these two encounters, Potter had responded to a call regarding an alleged theft at the Four Brothers mower and tractor dealership. The dealership representatives called Potter's attention to three mowers, each of which had their gasoline caps removed and none of which held any gasoline in their tanks. [8]

After that, Potter returned to the Xterra and questioned Fowler about involvement in any theft of gasoline, which Fowler denied. From our reading of the record, Potter took no further action with respect to Fowler after that point. [9] There was another encounter between West and Potter, on the one hand, and Fowler and Cox, on the ***172** other, on either November 3 or 10 wherein Fowler allowed the officers to look inside the Xterra. At that time, the officers noticed that there were three bolt cutters, binoculars, and a pry bar inside the vehicle. When questioned about those items, Fowler attempted to explain the presence of the tools in his vehicle by saying he was an electrician. That explanation failed to quell West's suspicions of Fowler because (as West explained) he ran a construction company and was aware of the tools and equipment used by electricians, and those items would not ordinarily be used by electricians. [10] This encounter occurred near Lattimore Materials, which had suffered multiple recent burglaries.

Testimony about the burglaries at Lattimore Materials revealed that a part of the method of operation of the burglars was to sever cables or heavy wires and remove them from the site. In addition, the burglars had cut padlocks on the gates of the premises more than once. While investigating one of the burglaries, Torrez found three sets of bolt cutters near some of the cut cables, and he suspected that the bolt cutters had been used to cut the cables.

III. Store's Surveillance Video Insufficiently Authenticated

Fowler contends that because the video surveillance footage from the Family Dollar store was not properly authenticated, the trial court erred by admitting it into evidence. We agree.

The challenged video recording was a copy of another recording from a surveillance camera at the Family Dollar store. The Family Dollar store receipt found by Torrez near the stolen ATV evidencing the sale of a box cutter (the packaging of which had likewise been found near the ATV) revealed the time and date of its issuance. Torrez took the receipt to the issuing Family Dollar store and discovered that the store had a surveillance video recording from the date and time the receipt was issued. The State maintains that the surveillance video recording captured the image of a man the State alleged to be Fowler entering the Family Dollar store a few minutes before the time and date set out on the receipt found by Torrez near the ATV, then, several minutes later, buying items. However, the video made by the Family Dollar store was not saved in a format that could be copied, so Torrez (and another officer who was accompanying him) focused Torrez' police-department-issued video camera on the screen displaying the Family Dollar video and made a video recording of a portion of the Family Dollar surveillance video. The fact that the challenged video recording is a recording of a recording is not the problem which must be addressed. A problem, however, exists because there is no evidence that the original video recording portrayed what the State maintains that it depicts.

[1] "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." TEX. R. EVID. 901(a). "Video recordings or motion pictures sought to be used in evidence are treated as photographs and are properly authenticated when it can be proved that the images reflect reality and are relevant." *Cain v. State*, 501 S.W.3d 172, 174 (Tex. App.—Texarkana 2016, no pet.) (citing *Huffman v. State*, 746 S.W.2d 212, 222 (Tex. Crim. App. 1988)).

[2] **[3]** ***173** "In ruling on the admission or exclusion of photographic evidence, the trial court is accorded considerable discretion." *Huffman v. State*, 746 S.W.2d 212, 222 (Tex. Crim. App. 1988). "The trial judge does not abuse his or her discretion in admitting evidence where he or she reasonably believes that a reasonable juror could find that the evidence has been authenticated or identified." *Druery v. State*, 225 S.W.3d 491, 502 (Tex. Crim. App. 2007). "[A]uthentication or identification.... is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims." TEX. R. EVID. 901(a).

[4] The problem here is that while the State authenticated the video exhibit sponsored by Officer Torrez, there was no evidence presented that the video recording copied by Torrez accurately portrayed any relevant information. Torrez adequately demonstrated that the recording he made of the store's surveillance monitor was a duplicate copy of the relevant part of the original surveillance recording. However, there was no evidence presented by the State which purports to precisely describe what Torrez recorded or which sets out the circumstances that existed when the original recording was made.

In *Angleton v. State*, 971 S.W.2d 65 (Tex. Crim. App. 1998), the Texas Court of Criminal Appeals addressed authentication of an audiotape purportedly recording a conversation between Angleton and his brother. Angleton was accused of capital murder of his wife; the court of appeals had ordered reasonable bail be set after finding that the State failed to present sufficient evidence to warrant Angleton be held without bail. [11]

At issue in *Angleton* was an audiotape recording obtained by police from Angleton's brother, a recording in which two men discuss the murder of a woman. The State offered an enhanced copy of the audiotape, the enhancement being the improvement of the sound quality and the reduction of the background noise which existed on the original. A sponsoring witness said that he had spoken on multiple occasions to both Angleton and his brother and recognized their voices as the ones heard on the audiotape. *Id.* at 66.

The Texas Court of Criminal Appeals found that the tape was properly authenticated as required by Rule 901, as well as by "treatment of this issue in the federal courts." *Id.* at 68. Specifically, the sponsoring witness testified that he had reviewed both the original and enhanced recordings and that the enhanced copy "accurately depict[ed] the contents of the original." *Id.* The officer also was familiar with the voices of the defendant and his brother and thus could identify the speakers on the tape. Finally, there was "no evidence that the tape contained any pauses or breaks in the recording,"

and its contents revealed specific inculpatory planning preparatory to the murder of Angleton's wife. *Id.* Thus, the circumstances surrounding the tape (including its being found in the possession of the defendant's brother, one of the participants in the recorded conversation) was "some evidence that the tape was not a fraudulent composition designed to frame [Angleton]." *Id.* [12]

***174** Here, however, there was nothing presented to show that the store's surveillance video was what the State purported it to be (an accurate recording or rendition of events in that particular store on a particular day at a particular time). While the date and time on the lower center part of the screen on Torrez' recording of the store recording generally corresponds with the date and time on the receipt found near the ATV, there was no evidence that the surveillance system was working properly on the date in question, that its on-screen clock was correctly set and functioning properly, or that the original accurately portrayed the events that purportedly occurred at the time and on the date shown in the video recording. [13] Without such proof, there was no showing that the store's video recording was made on the same day as the receipt or that it accurately portrayed what the State alleged that it portrayed. Because the Family Dollar's original surveillance recording was not properly authenticated, the trial court abused its discretion in admitting the video recording into evidence.

Absent such proof, there was no showing that the store's video recording was made on the same day as the receipt or that it accurately portrayed what the State alleged that it portrayed. Because the Family Dollar's original surveillance recording was not properly authenticated, the trial ***175** court abused its discretion in admitting the video recording into evidence. [14]

[5] **[6]** **[7]** We must now assess the error in admitting the evidence to determine whether it harmed Fowler, i.e., whether it affected his substantial rights. "Generally, errors resulting from admission or exclusion of evidence are nonconstitutional." *Gotcher v. State*, 435 S.W.3d 367, 375 (Tex. App.—Texarkana 2014, no pet.) (citing *Walters v. State*, 247 S.W.3d 204, 219 (Tex. Crim. App. 2007)). We see nothing in this circumstance that would elevate the erroneous admission of the video to the level of a constitutional violation of Fowler's rights. *See* TEX. R. APP. P. 44.2(b). As nonconstitutional error, harm resulted if Fowler's substantial rights were affected. *See Johnson v. State*, 72 S.W.3d 346, 348 (Tex. Crim. App. 2002); TEX. R. APP. P. 44.2(b). "[A] substantial right is affected when the error had a substantial and injurious effect or influence in determining the jury's verdict." *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000) (quoting *King v. State*, 953 S.W.2d 266, 271 (Tex. Crim. App. 1997)). In making our assessment, we consider everything in the record, the nature of the evidence supporting the verdict, the character of the alleged error, and how it relates to other evidence in the record. *Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

[8] Essentially, the State's case can be outlined as follows:

1. Blassingame reported his ATV stolen.

2. The ATV, identified by its vehicle identification number, was found (after investigating a seemingly unrelated burglary).

3. Within feet of the ATV was a receipt from a Family Dollar store which indicated that a box cutter had been purchased at a certain time and date. A box cutter package was also discovered nearby.

4. Law enforcement officials took the Family Dollar store receipt to the issuing store and were shown a security surveillance video recording of the store which corresponded to the time and date on the receipt.

5. Officers recorded sections of the security video recording which they believed corresponded with the receipt's information and used this to identify Fowler as a subject.

6. The officers' video recording of the Family Dollar video recording was presented as evidence in trial.

7. Presumably, the jury compared the person on the video with Fowler's appearance at trial and other evidence presented and concluded that Fowler was the person who had purchased the box cutter and dropped the paper evidence of the purchase near the stolen ATV. This tied Fowler to the stolen ATV.

Here, the error undoubtedly affected Fowler's substantial rights and was, therefore, harmful. The Family Dollar video recording was the evidence linking Fowler to the stolen ATV. We, therefore, sustain this point of error.

IV. Sufficiency of the Evidence

In evaluating legal sufficiency, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. ***176** *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (plurality op.) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd). Our rigorous legal sufficiency review focuses on the quality of the evidence presented. *Brooks*, 323 S.W.3d at 917–18 (Cochran, J., concurring). We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19, 99 S.Ct. 2781); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

[9] Legal sufficiency of the evidence is measured by the elements of the offense as defined by the measure known as the hypothetically correct jury charge. *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The "hypothetically correct" jury charge is "one that accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.*

[10] **[11]** **[12]** "[A] conviction can be supported solely by circumstantial evidence." *Kuciemba v. State*, 310 S.W.3d 460, 462 (Tex. Crim. App. 2010). As the Court of Criminal Appeals has stated,

> [E]vidence merely tending to affect the probability of the truth or falsity of a fact in issue is logically relevant. Moreover, the evidence need not by itself prove or disprove a particular fact to be relevant; it is sufficient if the evidence provides a small nudge toward proving or disproving some fact of consequence.

Montgomery v. State, 810 S.W.2d 372, 376 (Tex. Crim. App. 1990).

[13] Moreover, in performing a review of the sufficiency of the evidence, we must consider all of the evidence admitted at trial, even if that evidence was improperly admitted. *Moff v. State*, 131 S.W.3d 485, 489–90 (Tex. Crim. App. 2004). Consequently, we consider the key evidence of Fowler's guilt—the Family Dollar video recording—in our sufficiency analysis, even though, as we have already concluded, that evidence was improperly admitted at trial. [15]

[14] In this case, the evidence was sufficient for a rational jury to have found beyond a reasonable doubt that Fowler stole Blassingame's ATV. To reiterate that evidence, we note that the stolen ATV was found under suspicious circumstances, hidden in a wooded area near a business which had sustained multiple burglaries, and there was evidence that bolt cutters had been used in those burglaries. Multiple bolt cutters were found in Fowler's truck. After one of the burglaries, ATV tracks were found leading off through a field, and just beyond where the tracks ended, officers found Blassingame's ATV. Fowler and/or the truck Fowler was driving at the time were found a few times in odd hours and under suspicious circumstances in the neighborhood of that business. The Family Dollar receipt found near the stolen ATV was linked to a transaction at the store. Most importantly, the Family Dollar video depicted a person making the transaction that was

linked to the ATV whom the jury could have easily determined ***177** was Fowler. [16] This evidence is legally sufficient to support Fowler's conviction. We, therefore, overrule this point of error. [17]

Nevertheless, in light of the viewing by the trier of fact of the erroneously-admitted and harmful video recording, we reverse the trial court's judgment and remand this case for a new trial. [18]

All Citations

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Footnotes

1 *See* Act of May 29, 2011, 82d Leg., R.S., ch. 1234, § 21, 2011 Tex. Gen. Laws 3302, 3310 (amended 2015) (current version at TEX. PENAL CODE § 31.03(e)(4)(A) (West Supp. 2016)).

2 Originally appealed to the Fifth Court of Appeals, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013). We are unaware of any conflict between precedent of the Fifth Court of Appeals and that of this Court on any relevant issue. *See* TEX. R. APP. P. 41.3.

3 After the jury returned a guilty verdict in Burglary Case No. 1, Fowler moved to set aside the jury's verdict, and the trial court granted that motion. Fowler subsequently amended his request to a motion for new trial, which the trial court also granted. The trial court ultimately entered a judgment of acquittal in Burglary Case No. 1.

4 The State dismissed Burglary Case No. 2 after three days of testimony.

5 At the time of the burglaries, the Lattimore Materials facility located on the subject property was non-operational. Duane Wetteland, the area manager for Lattimore Materials, described other facilities owned by the company and explained that business needs determined whether the facility on the property at issue was operational or not. Wetteland testified that he periodically checked on the facility when it was non-operational.

6 Curtis described the area where the Xterra was parked as "a dirt road that you really can't even travel through." He continued, "I mean, I'm unaware of any vehicles being able to travel through it for years."

7 The issue of consent to the search of the vehicle was not challenged by Fowler at trial or in this appeal.

8 Potter actually said the gas cans were empty; from the context, he likely was referring to the mowers' tanks, but he never testified that anyone at Four Brothers told him there had been gas in the tanks the night before. Nonetheless, Potter did testify that he was responding to a report of stolen gasoline, and he left the dealership telling "management that [he] had a suspect and that [he] was going to go back and talk with them."

9 A recording of that encounter, recorded via the dash camera of Potter's police car, was admitted into evidence. There was much discussion and argument over the recording. The exhibit provided to this Court has several files; there are three video recordings, each less than thirty seconds in duration, which contain no audio. The final file is an audio/video recording that is two minutes and twenty-eight seconds in duration which captured Potter asking Fowler about any involvement in theft of gasoline from Four Brothers. Potter suggested during this exchange that the business had surveillance videos. When Fowler stated that he was done talking with the officer, the video ended. From the discussions at the bench by the parties and the trial court, it appears that this audio/video recording was played for the jury.

10 Fowler's objection to this testimony was sustained, but he did not request an instruction to disregard.

11 A defendant charged with capital murder may be held without bail "when the proof is evident." TEX. CONST. art. I, § 11; TEX. CODE CRIM. PROC. ANN. art. 16.15 (West 2015).

12 *Angleton* overruled *Kephart v. State*, 875 S.W.2d 319 (Tex. Crim. App. 1994) (per curiam), which bears some factual similarities to the Family Dollar video recording at issue here. Kephart was charged with possession of illegal drugs. At her trial, the State introduced a video recording acquired when police searched a motel room occupied by two people, neither of whom was Kephart. Kephart appeared in the recording, incrementally displaying greater and greater degrees of intoxication. Beneficial to the State's case is that there was also footage of Kephart talking with one of the people in whose motel room the video recording was discovered. "On the table in the video is a white substance and a baggie with what appears to be marihuana." *Id.* at 320. The video also contained an audible conversation between Kephart and one of the motel room occupants. *Id.*
The Texas Court of Criminal Appeals ruled that the video had not been sufficiently authenticated and that the trial court committed harmful error by admitting it to evidence. While a police officer testified that the video was an accurate copy of

the original, [12] "he had no personal knowledge of where or when the tape had been made" and "could not also state that the tape accurately represented the actual scene or event at the time it occurred." *Id.* at 322–23.

Angleton found fault in *Kephart*'s "suggest[ion] that Rule 901 was consistent with the pre-rules [of Evidence] authentication requirements." The court disavowed this approach and held, "Rule 901 is straightforward, containing clear language and understandable illustrations. *Kephart* is overruled." *Angleton*, 971 S.W.2d at 69. *Angleton* made clear that the Court of Criminal Appeals firmly believes Rule 901 speaks for itself when it states that the proponent of evidence must demonstrate that the evidence "is what the proponent claims it is." TEX. R. EVID. 901(a). It is our belief that *Kephart* was overruled primarily because of its improper incorporation of caselaw in its analysis that existed prior to the adoption of the Rules.

Like the video in *Kephart* (and unlike the recording in *Angleton*), there is no evidence in the record which establishes the origin of the original recording which was subsequently copied and presented as evidence. *Cf. Hines v. State*, 383 S.W.3d 615 (Tex. App.—San Antonio 2012, pet. ref'd) (arresting officer's dashboard camera did not function; another officer's camera did, and arresting officer able to testify second officer's video recording accurately represented events witnessed by arresting officer at scene).

13 *Cf. Page v. State*, 125 S.W.3d 640, 648–49 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd) (finding sufficient evidence of authentication where the sponsoring witness explained how the store's digital camera system worked, testified that he obtained the recorded images from the system shortly after the robbery there at issue, reviewed the recording with the police, copied the recording onto a videotape, gave the videotape to the officers, viewed the videotape before trial, and concluded that it had not been altered); *see also Standmire v. State*, 475 S.W.3d 336, 344 (Tex. App.—Waco 2014, pet. ref'd) (suggesting criteria to consider when analyzing authentication of security video "such as those used after hours in convenience stores and freestanding automatic teller machines").

14 To rule otherwise could encourage the circumvention of problems in the admissibility of an original recording by simply making a copy of the original and offering the copy and not the original.

15 We frankly acknowledge that, absent this video recording, the evidence would be legally insufficient to support Fowler's conviction, its existence being vital to the conviction.

16 Fowler argues that the trial court realized it had erred in admitting some evidence and "tried to correct it during trial." Fowler argues, "[T]he court made statements to the effect that he allowed certain evidence in because the State made representations about what the evidence would be that did not turn out to be accurate." His argument continues, "The trial court even announced on the record that it had made a mistake in allowing certain evidence to be admitted before the jury." The portions of the record to which Fowler cites in making this argument concern the trial court excluding evidence of a trailer, which the State argued was used by Fowler to move the ATV to the location where it was found. The court found that no connection had been made between that trailer and Fowler and excluded testimony and evidence related to the trailer. As we pointed out above, the State was trying three different offenses involving three different transactions and time periods, so there was a great deal of evidence to present. We find nothing in the record suggesting that Fowler opposed the State's motion to consolidate the three cases. In fact, he appears to have agreed to the consolidation.

17 Because resolution of the issue is dispositive, we need not address Fowler's point of error challenging the introduction of extraneous offense evidence.

18 The United States Supreme Court has clearly and unequivocally distinguished between the consequences that flow from reversals caused by trial error, such as in this case, and those resulting from insufficient evidence to convict:

> [R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e. g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished.

Burks v. U.S., 437 U.S. 1, 15, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).